

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ADIL LAHRICHI,

Plaintiff,

v.

LUMERA CORPORATION, a Delaware
corporation; MICROVISION, INC., a Delaware
corporation; and THOMAS D. MINO,

Defendants.

CASE NO. C04-2124C

ORDER

This matter comes before the Court on Defendants' Motion to Amend Answer (Dkt. No. 18). The Court has considered the papers filed by the parties and determined that oral argument is not necessary. The Court hereby finds and rules as follows.

Defendants request leave to amend their Answer to incorporate facts learned during discovery. Plaintiff states that he does not object to two of the three proposed amended factual allegations and presents no argument whatsoever as to the third factual allegation. (Pl.'s Resp. at 1-2.) The Court construes this failure to respond as confirmation that the amendment has merit. Since there is no dispute regarding the amendments to Paragraphs 23-25, and 35 of Defendants' Answer, the Court grants Defendants leave to amend these factual allegations.

1 Defendants also move to amend their Answer to add an after-acquired evidence defense. This
2 defense is grounded on two sets of facts: 1) Plaintiff violated a Confidentiality and Inventions Agreement
3 by taking personal possession of confidential and proprietary company documents while he still had full
4 access to Defendant Lumera's server and files, with the intention of retaining those documents after his
5 departure from the company, and indeed failed to return them after his departure; 2) Plaintiff failed to
6 disclose material facts about the involuntary termination of his previous employment. (Defs.' Mot. at 5.)

7 Leave to amend shall be freely granted when justice so requires. Fed. R. Civ. P. 15(a). The grant
8 or denial of an opportunity to amend is within the discretion of the district court. *Davis v. Foman*, 371
9 U.S. 178, 182 (1962). The leave sought should be granted absent undue delay, bad faith, repeated failure
10 to cure deficiencies, undue prejudice, or futility of amendment. *Id.* A proposed amendment is futile or
11 frivolous only if no set of facts can be proved under the amendment that would constitute a valid and
12 sufficient claim or defense. *Miller v. Rykoff-Sesxton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988).

13 Plaintiff objects to Defendants' proposed amendment, asserting that it would be futile.¹ An after-
14 acquired evidence defense is available where, after termination, it is discovered that the employee has
15 engaged in wrongdoing during his or her employment which was of such severity the employer would
16 have lawfully terminated that employee had it known of the wrongdoing at the time of discharge.
17 *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 361-62 (1995). Plaintiff asserts that he did not
18 retain company documents until after he was terminated and told to clear his office, thus it would not
19 have served as a lawful basis for dismissal. (Pl.'s Resp. at 3-4.) Defendants respond that Defendant
20 Lumera did not terminate Plaintiff, and that his conduct occurred before he departed from the company.
21 (Defs. Reply at 3.)

22 The parties engage in a similar debate as to Defendants' second basis for asserting an after-
23 acquired evidence defense. Plaintiff asserts that he was not involuntarily terminated by his previous

24 ¹ Plaintiff does not argue that Defendants' proposed amendment is sought in bad faith or causes
25 undue delay or undue prejudice. Thus, the Court finds it need not address these factors.

1 employer, thus he could not have been discharged for failing to disclose a material fact while he was
2 interviewing for a managerial position at Lumera. (Pl.'s Resp. at 4.) Defendants respond that he was
3 essentially terminated and he should have disclosed this information to Lumera as a potential employer.
4 (Defs.' Reply at 4.) These are factual disputes. They do not demonstrate that there is no set of facts that
5 could support Defendants' after-acquired evidence defense. Accordingly, Defendants should have the
6 opportunity to present their theory of the case, including their version of the facts. At the pleading stage,
7 the party opposing amendment faces a heavy burden to show that there are no factual circumstances
8 under which the proposed amendment could be supported. In the case at bar, Plaintiff has failed to meet
9 this burden.

10 Defendants' Motion to Amend is GRANTED in its entirety. Counsel are directed to e-file
11 Plaintiff's Amended Answer.

12 SO ORDERED this 2nd day of August, 2005.

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15 UNITED STATES DISTRICT JUDGE
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